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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Detroit, Howe and Jacksboro,
Texas, Antlers and Hugo, Oklahoma)

MM Docket No. 97-26
RM-8968
RM-9089
RM-9090

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Lewisville, Gainesville, Robinson,
Corsicana, Jacksboro, and Mineral
Wells, Texas

MM Docket No. 97-91
RM-8854
RM-9221

To: The Commission

Consolidated Opposition to Applications for Review

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Dated: October 9, 1998

TABLE OF CONTENTS

	<u>Page</u>
Summary	i
I. Introduction	3
II. The Joint Applicants' Procedural Arguments	5
A. The Allocations Branch Correctly Retained Heftel's Petition Even Though It Was Not Timely Filed in the <u>Farmersville</u> Proceeding	5
1. The Decision of the Allocations Branch to Retain Heftel's Petition Was Consistent with the Commission's Decision in <u>Pinewood</u>	5
2. The Commission Must Not Engage in the Speculation and Conjecture Required to Dismiss Heftel's Petition under the <u>Pinewood</u> Rationale Advanced by Snyder	8
B. The Allocations Branch Properly Accepted Heftel's Petition and Issued the NPRM Soliciting Comments/Counterproposals	10
C. The Allocations Branch Properly Retained Heftel's Petition and the Mass Media Bureau Properly Considered Snyder's Upgrade Application as a Counterproposal in this Proceeding	13
1. The Facts of the Present Case are Distinguishable from the Facts in the Cited Cases	14
2. The Cited Cases Were Incorrectly Decided Because They Are Inconsistent with Section 73.208(a)(3) of the Rules	15
3. The Cited Cases Were Incorrectly Decided Because They Are Inconsistent with Section 307(b) of the Communications Act	18
III. Metro's Other Arguments	21
A. Metro's "Curative Amendment"	21

	<u>Page</u>
B. The Heftel/Snyder Agreement	21
C. Metro's Disagreements with Snyder	21
D. Heftel's Proposal to Serve the Community of Robinson, Texas	22
Conclusion	25

Summary

The Report and Order under review approves a Petition for Rule Making ("Petition") filed by Heftel Broadcasting Corporation in July 1996, which proposed various changes in the FM Table of Allotments. The other parties to this proceeding do not dispute the facts that the changes proposed by Heftel would provide enhanced service to the public--which the Report and Order estimated to be a net service gain to 3,248,422 people, and first local service to Lewisville (population 46,521 and Robinson (population 7,111)--and would provide considerably more service to the public than would the proposals of the other parties to this proceeding.

One of the opposing parties contends that Heftel's Petition should have been dismissed by the Commission's staff on January 17, 1997, the date of issuance of a Report and Order in another FM rule making proceeding, because the Petition was not timely filed as a counterproposal in that proceeding. However, in situations where, as in the other proceeding, there was no irreconcilable conflict between the rule making proceeding and the late-filed counterproposal, there is no requirement or good reason for the staff dismiss the petition rather than to retain the petition for use in a separate proceeding, as happened in this case.

One of the opposing parties contends that Heftel's Petition should have been dismissed when it was filed on July 26, 1996, because it did not protect the Channel 240C1 allotment (and reference point) for Station KYXS-FM at Mineral Wells, Texas (which operates on Channel 240C3). However, it is routine for the Commission to delete (or downgrade) unused FM channel allotments,

and the fact that Channel 240C1 has a special reference point does not prevent a change in the allotment if it would serve the public interest.

The opposing parties contend that Heftel's Petition should have been dismissed on January 21, 1997, or on May 5, 1997 (the comment/counterproposal date in this proceeding), because prior to the latter date the licensee of Station KYXS-FM at Mineral Wells had filed an application proposing an upgrade from Channel 240C3 to Channel 240C1. The opposing parties cite several decisions of the Allocations Branch in support of their position. However, in this case the applicant had previously applied for and had been granted a construction permit to use Channel 240C1 facilities, but it did not complete construction and its permit was canceled by the Commission and lapsed for more than 18 months. The current upgrade application was refiled four months after Heftel's Petition was filed. Furthermore, the decisions relied upon by the other parties are plainly contrary to Section 73.208(a)(3) of the rules and, in any event, they are incompatible with the mandate of Section 307(b) of the Communications Act.

Finally, one party contends that Heftel's proposal should be denied because the proposal to serve Robinson is not entitled to a "preference" for first local service, and that the proposed substitution of Channel 300A for Channel 300C1 at Corsicana and the reallocation of channel 300A to Robinson would not serve the public interest. Heftel believes that the Report and Order correctly determined that the proposal to serve Robinson deserved a "preference" for first local service and also that, regardless of the foregoing, Heftel's proposal, taken as a whole, clearly and very substantially serves the public interest.

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To: The Commission		

Consolidated Opposition to Applications for Review

Heftel Broadcasting Corporation ("Heftel"),^{1/} by its counsel, pursuant to Section 1.115(d) of the Commission's rules, hereby submits this Consolidated Opposition to the Application for Review filed with the Commission by Jerry Snyder and Associates ("Snyder") on September 21, 1998, ("Snyder Application") and to the Application for Review filed with Commission by Metro Broadcasters-Texas, Inc. ("Metro") on September 24, 1998 ("Metro Application").^{2/} Snyder and Metro (hereafter collectively referred to as "Joint Applicants") ask the Commission to review

^{1/} Heftel is the parent of KICI-FM License Corp., licensee of Station KDXX-FM (formerly KICI-FM), Corsicana, Texas, and parent of KECS-FM License Corp., permittee of Station KECS(FM), Gainesville, Texas.

^{2/} On September 29, 1998, Heftel filed a Motion for Extension of Time which requested extension of the time through October 9, 1998, in which to submit its response to Snyder's Application for Review to allow the filing of a consolidated pleading which also responds to Metro's Application for Review.

Report and Order of the Chief of the Allocations Branch, Policy and Rules Division, Mass Media Bureau ("Allocations Branch") (DA 98-1650, released August 21, 1998) ("Report and Order"), and to dismiss Heftel's Petition for Rule Making ("Petition") which is the subject of the Report and Order.

Heftel opposes the relief requested by the Joint Applicants.^{3/} Heftel requests that the Commission affirm the amendment to the FM Table of Allotments (Section 73.202(b) of the rules) in the manner proposed in Notice of Proposed Rule Making and Order to Show Cause in MM Docket No. 97-91, 12 FCC Rcd 3059 (Allocations Branch, March 4, 1997) ("NPRM"), which led to the adoption of the Report and Order. Specifically, Heftel requests that the Commission revise the FM Table of Allotments as follows:

<u>City</u>	<u>Channel No.</u>	<u>Present</u>	<u>Proposed</u>
Lewisville, TX		--	300C1
Gainesville, TX		233C, 300C2	233C
Robinson, TX		--	300A
Corsicana, TX		300C1	--
Jacksboro, TX		229A, 299A ^{4/}	229A, 237A
Mineral Wells, TX		240C1	240C3 ^{5/}

^{3/} Heftel filed a Petition for Partial Reconsideration of the Report and Order with the Allocations Branch on September 21, 1998, but is concurrently filing a request that the Allocations Branch refer the matters raised therein to the full Commission for consideration in the context of its review of the pending Applications for Review. Accordingly, Heftel supports the Joint Applicants only insofar as they request that the Commission assume jurisdiction over these proceedings and review all of issues raised by the parties (including those raised by Heftel in its Petition for Partial Reconsideration). In all other respects, Heftel opposes the relief requested in the Joint Applicants' Applications for Review.

^{4/} Hunt Broadcasting, Inc., licensee of Station KJKB, Jacksboro, Texas, has filed an application (BPH-980618IC) to upgrade Station KJKB from Channel 299A to Channel 299C3. Heftel has filed an Informal Objection to the Hunt application on the ground that the application was filed in an untimely manner vis-a-vis the NPRM and is inconsistent with the Report and Order.

^{5/} The Commission should also change the reference point for Station KYXS (currently operating on Channel 240C3) from NL 32-41-06; WL 98-09-32, as specified in Amendment of Section 73.202(b), Table of Allotments, for Broadcast Stations (Mineral Wells and Winters, Texas), 7 FCC Rcd 1791 (Allocations Branch, 1992) ("Mineral Wells proceeding"), to the Station's current tower/transmitter site (i.e., see Petition, Exhibit No. 1, Technical Report of James L. Sorensen, unnumbered page 4 (of text) and Exhibit E-7 thereto.).

I. Introduction

This proceeding was initiated as the result of the Petition filed by Heftel on July 26, 1996. Heftel's Petition proposed, and the NPRM sought comment on, modification of the FM Table of Allotments in the State of Texas in the following manner:

- (1) substitute Channel 300C1 for Channel 300C2 for use by Heftel's Station KECS (permit only) at Gainesville, and reallocate the channel to Lewisville;
- (2) substitute Channel 300A for Channel 300C1 for use by Heftel's Station KICI-FM (now KDXX-FM), at Corsicana, and reallocate the channel to Robinson;
- (3) substitute Channel 237A for Channel 299A for use by Station KJKB, Jacksboro (to accommodate Channel 300C1 at Lewisville); and
- (4) downgrade the allotment for Snyder's Station KYXS-FM at Mineral Wells, from Channel 240C1 to Channel 240C3 (to accommodate Channel 237A at Jacksboro).

The Allocations Branch concluded that Heftel's proposal would bring about a net service gain to approximately 3,248,422 persons (Report and Order, Paragraph 7), and would bring a first local service to the community of Lewisville (population 46,521) and to the community of Robinson (population 7,111). Id., Paragraph 8. Although the Allocations Branch dismissed Metro's counterproposal (to change the allotment for Station KHYI, Howe, Texas, from Channel 237C3 to Channel 237C2) on procedural grounds (Id., Paragraph 6)^{6/}, it concluded that the anticipated gains from Metro's counterproposal (i.e., net service gain to only approximately 137,974 people) were inferior to those proposed in Heftel's Petition. Id., Paragraph 7. Although Snyder has not described the public interest benefits of its counterproposal to upgrade Station KYXS-FM at Mineral Wells from Channel 240C3 to Channel 240C1 in its Comments or in its Application for Review,^{7/} Heftel's

^{6/} See Section III. A, below.

^{7/} Prior to the issuance of the Report and Order, Heftel and Snyder reached an agreement which contemplated the modification of Snyder's pending application to upgrade Station KYXS-FM from Channel 240C3 to Channel 240C1 (BPH-961125IG) to an unspecified site which would allow the implementation of the other aspects of Heftel's Petition. Therefore, the Allocations Branch did not analyze the public service benefits of

Comments filed May 5, 1997 demonstrate that implementation of Snyder's proposal would result in additional service to approximately 357,744 persons (with no service to "underserved" areas). See Technical Exhibit of Louis R. du Treil, Sr., pages 4-5. Indeed, the gain from Heftel's proposal (new service to 3,248,422 persons net) far outweighs the combined total of the Snyder and the Metro net service gains (137,974 plus 357,744 equals 495,748), even without considering Heftel's proposed first local service to Lewisville and Robinson.

Joint Applicants do not contest, to any significant extent, the foregoing conclusions of the Allocations Branch in the Report an Order. Neither Snyder nor Metro describes the public interest benefits of their proposals, nor do they claim that their proposals, taken singly or together, would provide superior (or even comparable) service to the public vis-a-vis Heftel's proposal. The reason is obvious: their proposals are unquestionably inferior to Heftel's proposal from the perspective of service to the public. On the other hand, Heftel seeks--indeed it welcomes--a comparison of its proposal with those of Snyder and Metro (if Metro is deemed qualified to participate in this proceeding). It is confident that once the Commission undertakes a substantive evaluation of the pending proposals, it will conclude that the changes in the FM Table of Allotments proposed by Heftel (see above) would best serve the public interest and should be adopted.

In the absence of having the slightest basis upon which to contend that their proposals would provide superior service to the public, the pleadings of the Joint Applicants are, by necessity, based on contentions that the Allocations Branch and the Mass Media Bureau ("MMB") committed procedural errors which are so severe as to require nothing less than that the Commission dismiss Heftel's Petition without any consideration on the merits. It is in this context that the Commission must review the Joint Applicants' procedural arguments.

Snyder's pending application.

II. The Joint Applicants' Procedural Arguments

The Joint Applicants for Review make three procedural arguments: (1) because Heftel's Petition was not filed in a timely manner vis-a-vis the comment date established in another proceeding (i.e., Notice of Proposed Rule Making in Amendment of Section 73.202(b) (Re: Farmersville, Texas, Ada, Oklahoma, et al. (MM Docket No. 96-10), 11 FCC Rcd 1790 (Allocations Branch, 1996) ("Farmersville proceeding")), the Allocations Branch should not have retained Heftel's Petition but instead should have dismissed the Petition as of the date the Report and Order in the Farmersville proceeding was released--i.e., January 17, 1997 (see Snyder Application, pages 7-9); (2) because Heftel's Petition did not "protect" the allotment of Channel 240C1 at Mineral Wells, Texas (and the designated reference point), the Allocations Branch should not have retained Heftel's Petition but instead should have dismissed the Petition when it was filed--i.e., July 26, 1996 (see Metro Application, pages 9-10); and (3) because Snyder's application to upgrade Station KYXS-FM, Mineral Wells from Channel 240C3 to Channel 240C1 was filed (and accepted for filing) prior to the comment/counterproposal date specified in the NPRM in this proceeding, the MMB should not have treated Snyder's upgrade application as a timely-filed "counterproposal," but instead should have dismissed Heftel's Petition on the date Snyder's application was accepted for filing--i.e., January 21, 1997 (see Snyder Application, pages 9-11) or on the comment date--May 5, 1997 (see Metro Application, pages 10-12 and 13-4). Heftel will now respond to these contentions.

A. The Allocations Branch Correctly Retained Heftel's Petition Even Though It Was Not Timely Filed in the Farmersville Proceeding.

1. The Decision of the Allocations Branch to Retain Heftel's Petition Was Consistent with the Commission's Decision in Pinewood.

The Notice of Proposed Rule Making in the Farmersville proceeding (supra) announced that comments and counterproposals were due by April 5, 1996. On July 26, 1996, Heftel filed its Petition which, among other matters, proposed revision of the FM Table of Allotments to provide a different Class A channel (i.e., 237A) for Station KJKB at Jacksboro, Texas, than the channel (i.e., 299A) which was under consideration in the Farmersville proceeding. The Petition also proposed the downgrade of Channel 240C1 at Mineral Wells, a community which was not under consideration in the Farmersville proceeding. Four months later, on November 25, 1996, Snyder filed its Channel 240C1 upgrade application. On January 17, 1997, the Allocations Branch issued its Report and Order in the Farmersville proceeding (12 FCC Rcd 4099 (1997)). At footnote 7 (pages 4102-3), the Allocations Branch stated the following with regard to Heftel's Petition:

On July 26, 1996, Heftel Broadcasting Corporation filed a Petition for Rule Making proposing two interrelated reallocation proposals. Included in that Petition for Rule Making was a proposal for a Channel 300C1 allotment at Lewisville, Texas, which conflicts with the Channel 299A allotment at Jacksboro. To address this conflict, Heftel Broadcasting proposes an alternative Channel 237A allotment at Jacksboro. The Heftel Broadcasting Petition for Rule Making was not filed by the April 5, 1996, comment date in this proceeding. The Channel 237A allotment at Jacksboro also requires a channel substitution at Mineral Wells, Texas. In view of this untimeliness and the fact that the community of Mineral Wells has not been included in this proceeding, we will not accommodate this aspect of the Heftel Broadcasting Petition for Rule Making in this proceeding. (emphasis supplied)

Although the Allocations Branch stated that Heftel's Petition would not be considered "in this [the Farmersville] proceeding" (emphasis added), it did not state whether it would dismiss the Petition or retain it for consideration in another proceeding. In point of fact the Allocations Branch did not dismiss Heftel's Petition, but instead retained the Petition and, on March 14, 1997, it issued the NPRM which led to the Report and Order now under review.

Snyder asserts that the Allocations Branch erred as a matter of law in failing to dismiss Heftel's Petition on January 17, 1997, when it issued the Report and Order in the Farmersville proceeding.^{8/} It argues that if Heftel's Petition had been dismissed, Heftel would have been precluded from refileing its Petition by Section 73.208 of the rules^{9/} because Snyder filed its upgrade application on November 25, 1996, which was prior to the date the Report and Order in the Farmersville proceeding was issued (i.e., January 17, 1997).^{10/} In support of its position, Snyder relies on the Commission's decision in Pinewood, South Carolina, 5 FCC Rcd 7609 (1990) ("Pinewood").

In Pinewood, the Commission did affirm a decision of the Allocations Branch to dismiss a late-filed counterproposal. However, there is no contradiction between the Allocations Branch decision to dismiss the late-filed counterproposal in Pinewood and its decision to retain Heftel's Petition. In Pinewood, the untimely petition was returned for good reason: namely, the petitioner's proposal (to allot Channel 238A for a new station in Pinewood, South Carolina) conflicted irreconcilably with the action which the Commission was contemplating in that proceeding (i.e., to allot Channel 238A for a new station at Summerton, South Carolina). Therefore, no useful purpose would have been served in retaining the untimely Pinewood Petition. By contrast, the "conflict" between the Farmersville NPRM and Heftel's proposal for Station KJKB at Jacksboro

^{8/} On occasion, Snyder inconsistently contends that the Commission did "dismiss" Heftel's Petition. See, e.g., Snyder Application, pages 2, 4.

^{9/} Section 73.208(a)(3)(iii) provides that FM minor change applications are protected from conflicting FM rule making petitions as soon as the application is filed with the Commission.

^{10/} Snyder apparently believes that if Heftel's Petition is not dismissed, and is instead treated as having been filed on July 26, 1996, Heftel's Petition would receive "cut-off preference to Snyder's application" (Snyder Application, page 9), and Snyder's application "had to be denied" (Id., page 4). Heftel disagrees. Nothing in Section 73.208(a)(3) of the Commission's rules requires the result imagined by Snyder. All that the rules require is that the Commission compare the public interest benefits of the two proposals--which is exactly what Heftel now seeks.

related exclusively to which Class A channel would be allotted (Channel 299A versus 237A), and did not require a choice between irreconcilable proposals for different communities.^{11/} Therefore, it was both reasonable and proper, and perfectly consistent with Pinewood, for the Allocations Branch not to dismiss Heftel's Petition but to retain it for consideration in a separate proceeding such as the one commenced by the issuance of the NPRM.

2. The Commission Must Not Engage in the Speculation and Conjecture Required to Dismiss Heftel's Petition under the Pinewood Rationale Advanced by Snyder.

There is another flaw in Snyder's contention that Pinewood requires the Commission to dismiss Heftel's Petition because it was untimely filed vis-a-vis the Farmersville proceeding. Snyder assumes that if Heftel's Petition had been returned on timeliness grounds, Heftel would have been barred from refileing the Petition by Section 73.208(a)(3) of the rules because Snyder filed its upgrade application on November 25, 1996, which was prior to the issuance of the Farmersville Report and Order (on January 17, 1997). Central to this argument is Snyder's assumption that the staff would have returned Heftel's Petition concurrently with the issuance of the Report and Order in the Farmersville proceeding--i.e., on January 17, 1997.

However, there is no warrant whatsoever for Snyder's assumption--indeed, Pinewood, the very case relied upon by Snyder as support for its position, shows that its assumption is wrong. In Pinewood, the late-filed Petition was returned by staff letter dated May 3, 1989

^{11/} Similarly, in the instant proceeding, the Allocations Branch refused to consider an untimely counterproposal of Graham Newspapers, Inc. ("Graham") for an upgrade of Station KWKQ at Graham, Texas (which is dependent upon the proposed substitution of Channel 237A for Channel 299A at Jacksboro). However, the Allocations Branch did not dismiss the proposal; instead, it followed the procedure followed in the Farmersville proceeding and stated that the Graham proposal is not acceptable for consideration "in this proceeding." (Report and Order, footnote 2). Official notice requested; also see Attachment, letter of Erwin Krasnow, Esq., counsel to Graham. The decision not to dismiss Graham's proposal, like Heftel's late-filed proposal in the Farmersville proceeding, did not represent an irreconcilable conflict with the proposal under consideration, and therefore the Allocations Branch has correctly decided not to dismiss Graham's counterproposal.

(Pinewood, 5 FCC Rcd at 7609), which was only three and one-half months after the Petition had been filed (on January 17, 1989), and more than 19 months before the ultimate Report and Order was actually issued.^{12/} If, contrary to what actually happened, the staff had followed the same procedure with Heftel's Petition and dismissed the Petition three and one-half months after it was filed (on July 26, 1996), it would have taken that action on or about November 10, 1996. This would have given Heftel ample opportunity to refile its Petition prior to the date Snyder refiled its Channel 240C1 upgrade application (November 25, 1996).

Of course, to even suggest the foregoing hypothetical chronology demonstrates the absurdity of Snyder's position. In order to accept Snyder's argument, the Commission must first pretend that the Allocations Branch dismissed Heftel's Petition and then speculate about when the dismissal would have taken place and about how/when Heftel would have reacted in response to such hypothetical action. The Commission obviously cannot make decisions based on such conjecture. Accordingly, the Commission must decline Snyder's invitation to dismiss Heftel's Petition based the speculative timing of an action which the Allocations Branch might have taken but did not.

For the foregoing reasons, the Commission should reject Snyder's request to dismiss Heftel's Petition nunc pro tunc based on the fact that it was not timely filed in the context of the Farmersville proceeding.

^{12/} Summerville, Summerton, and Bowman, South Carolina, 5 FCC Rcd 7475 (Policy and Rules Division, December 13, 1990).

B. The Allocations Branch Properly Accepted Heftel's Petition and Issued the NPRM Soliciting Comments/ Counterproposals.

Although Snyder's Station KYXS-FM operates on Channel 240C3 at Mineral Wells, Texas, Channel 240C1 is the specified allotment for Mineral Wells in the FM Table of Allotments. Snyder instituted the rule making proceeding which resulted in the upgrade of Channel 240C3 to Channel 240C1 and a change in the reference point for Station KYXS-FM (see Mineral Wells proceeding, and note 5, supra), and it applied for and was granted a construction permit for Channel 240C1. Snyder's permit expired and was later canceled by the Commission on December 13, 1994. When Snyder's construction permit for Channel 240C1 was canceled, the Commission obviously might have, on its own motion, downgraded the allocation to Channel 240C3 and changed the reference point which it had adopted in the Mineral Wells proceeding. However, it did not. The Joint Applicants contend that because the Commission retained Channel 240C1 and because Heftel's Petition did not "protect" Channel 240C1 at Mineral Wells, Heftel's Petition was defective ab initio. According to the Joint Applicants, the Allocations Branch should have dismissed the Petition as soon as it was filed on July 26, 1996, and should not have issued the NPRM.

To state the obvious, the reason the Commission's rules allow the filing of petitions for FM rulemaking to amend the FM Table of Allotments is to encourage parties to propose changes in currently unused FM allotments which they believe will better serve the public interest than would maintenance of the status quo. While the Commission's rules provide protection from such petitions for spectrum currently in use by stations, and also for certain granted and filed applications (see Section 73.208(a)(3)), the Commission's rules obviously do not protect "authorized" but unused allocations and portions of the spectrum from conflicting FM rule making petitions.

In support of its remarkable position that, under the FCC's rules, Channel 240C1 at Mineral Wells has, in effect, been held "in reserve" since the cancellation of Snyder's permit in December 1994, awaiting the filing of another upgrade application by Snyder or its successor, Metro cites El Dorado and Lawton, Oklahoma, 5 FCC Rcd 618 (Allocations Branch, 1990), affirmed, 5 FCC Rcd 6737 (Policy and Rules Division, 1990) ("El Dorado"). According to Metro, El Dorado holds that the Commission will not delete an FM channel,^{13/} but El Dorado does not support this proposition. In El Dorado, the Commission refused to delete a channel advanced in a counterproposal "since its petition does not include a request for deletion of the channel" (Allocations Branch, page 618) (emphasis supplied), and "since no request to delete the channel had been included in the petitioner's proposal" (Policy and Rules Division, page 6737) (emphasis supplied). Here, by contrast, Heftel expressly requested in its Petition that Channel 240 be "downgraded" from Channel 240C1 to Channel 240C3, which was the equivalent to a request for "deletion" in the current context.

Metro contends that Section 73.207(a) of the rules bars consideration of Heftel's Petition^{14/}. That regulation provides, in pertinent part, that the Commission will not accept petitions to amend the FM Table of Allotments "unless the reference points meet all of the minimum distance separation requirements of this section." Metro has read this provision as precluding the consideration of all FM rule making proposals which are inconsistent with the spacing requirements vis-a-vis current allocation reference points. The fallacy in Metro's position is that it attempts to separate the deletion of an FM channel with the deletion of the reference point associated with the channel which is proposed for deletion. Stated otherwise, Metro fails to distinguish between two

^{13/} Metro Application, page10.

^{14/} Metro Application, page10.

situations: (1) where a petition proposes merely to make a change in a designated reference point but proposes no change in the basic channel allotment; and (2) where a petition (such as Heftel's Petition) which proposes to change a channel allotment, the addition of which was the very basis for the specification of the reference point at issue, as in the Mineral Wells proceeding (see note 5, supra). In the latter situation, the channel change and the reference point change are obviously inseparable.

Because the Commission's rules obviously contemplate the filing of petitions to change the allotment of FM channels, it follows that the rules must contemplate the filing of petitions which propose not only a change in the FM allotments but also a change in the special reference point which was adopted in the context of the same proceeding which added the allotment proposed for deletion. If Section 73.207(a) of the rules were interpreted in the manner advanced by Metro, it would lead to an absurd result; namely, that while all other unused FM allotments and their designated reference points (see, Section 73.208(a)(1) of the rules) would be subject to elimination or reallocation upon consideration of rule making petitions, those allotments which carried with them special "reference points" would be immune from such petitions, and would forever remain in the FM Table of Allotments even if they were not being utilized and even if the Commission received a petition for rule making which proposed deletion of the unused allotment and the adoption of another FM allotment pattern which would better serve the public interest. Therefore, a petition for rulemaking which proposes a channel change which is inseparable from a reference point change must be allowed. For this reason, the Commission must reject Metro's contention that Section 73.207(a) is an absolute bar to consideration of Heftel's Petition.

C. The Allocations Branch Properly Retained Heftel's Petition and the Mass Media Bureau Properly Considered Snyder's Upgrade Application as a Counterproposal in this Proceeding.

The NPRM specified May 5, 1997, as the date for filing comments and counterproposals. As stated above, Snyder refiled its upgrade application on November 25, 1996. On January 28, 1998, the MMB issued a Public Notice (Report No. 2251) announcing that Snyder's application would be treated as a counterproposal in this proceeding.^{15/} Heftel agrees with the MMB that Snyder's application should be treated as a counterproposal, and asks the Commission to compare the merits of Heftel's Petition to those of Snyder's application. The Joint Applicants disagree. They contend that because Channel 240C1 is allotted to Mineral Wells, and because Snyder refiled its upgrade application for Channel 240C1 prior to the May 5, 1997 comment/counterproposal date specified in the NPRM, Snyder's application should not be considered as a counterproposal, thereby subjecting it to comparative consideration with Heftel's Petition; rather, they contend that the timely filing of Snyder's application by the May 5, 1997 comment date required dismissal of Heftel's Petition.^{16/}

The Joint Applicants cite as authority for their position the following decisions of the Allocations Branch: Martin, Tiptonville and Trenton, Tennessee, DA 98-1799 (September 11, 1998); Driscoll, Gregory and Robstown, Texas, 9 FCC Rcd 3580, n.3 (1994); Calhoun City,

^{15/} In the Report and Order, the Allocations Branch did not compare the benefits of Snyder's proposal with those of Heftel's Petition. That comparative consideration became moot when Snyder and Heftel reached an agreement which contemplated the modification of Snyder's pending application in a manner which would allow for both the upgrade of KYXS-FM to Channel 240C1 and the implementation of Heftel's proposal. That issue is no longer moot because, as Snyder acknowledges (Snyder Application, pages 5-7), the parties have terminated the agreement.

^{16/} Snyder contends that the Petition should have been dismissed when its application was accepted for filing on January 21, 1997. Snyder Application, page 9. Metro suggests that Heftel's Petition should have been dismissed on May 5, 1997 because it was in conflict with Snyder's pending upgrade application as of that comment date. Metro Application, pages 11-12, 13-14.

Mississippi, 11 FCC Rcd 7660 (1996); Greenfield and Stockton, Missouri, 10 FCC Rcd 5481 (1995); and Woodville, Mississippi, and Clayton, Louisiana, 9 FCC 2769 (1994) (referred to collectively as the "Cited Cases").^{17/} Heftel acknowledges that the Cited Cases stand for the proposition for which they are cited by the Joint Applicants; namely, that it is the practice of the Allocations Branch to dismiss a petition for rule making which proposes to delete an allotment if, by the specified comment/counterproposal date, an application is filed for the allotment in question.

Heftel has three distinct responses to the Joint Appellants' argument based on the Cited Cases. First, the facts of the present case are factually distinguishable from those in the Cited Cases and therefore allow for a different result. Second, the Cited Cases were incorrectly decided as a matter of law because they are inconsistent with Section 73.208(a)(3)(iii) of the Commission's rules; accordingly, the Commission should declare that the Cited Cases were incorrectly decided and no longer have precedential value. Third, the Cited Cases are in conflict with Section 307(b) of the Communications Act (47 U.S.C. Section 307(b)); accordingly, the Commission should declare that the Cited Cases were wrongly decided and no longer have precedential value.

1. The Facts of the Present Case are Distinguishable from the Facts in the Cited Cases.

Snyder's permit for the Channel 240C1 upgrade was canceled by Commission on December 13, 1994. Nineteen months after the permit was canceled, and with Snyder taking no action to file a second upgrade application, Heftel filed its Petition which was critically dependent upon a downgrading of Snyder's Station KYXS-FM from Channel 240C1 to Channel 240C3 (Snyder's pending operating channel). These facts distinguish the instant case from the Cited Cases. As a result of the Mineral Wells proceeding which upgraded Channel 240 from C3 to C1, the

^{17/} Snyder Application, page 11 and Metro Application pages 10-11.

Commission afforded Snyder 90 days to file its upgrade application, and thereafter provided Snyder with a specified time period in which to construct its modified facility. Once its permit had been canceled, Snyder had no right, interest or expectancy of any kind with regard to Channel 240C1. It delayed the filing of a second application for Channel 240C1 at its risk. Although Snyder was not legally obligated to implement its permit for Channel 240C1, the Commission must not allow a party such as Snyder to sit back and do nothing until a third party such as Heftel files a petition to utilize the spectrum which Snyder had reserved but then abandoned (for whatever reason.) The Joint Applicants' argument amounts to an assertion that although Snyder's permit for Channel 240C1 was canceled by the Commission, Channel 240C1 was, in effect, held "in reserve" until such time as Snyder chose to file another channel 240C1 upgrade application, subject only to the caveat that Snyder was required to file its second upgrade application by the comment date established in a subsequent rulemaking proceeding instituted by a party which sought nothing more than to use the available FM spectrum with a proposal which might be (and in Heftel's position clearly is) vastly superior to Snyder's proposal in terms of service to the public. In none of the Cited Cases did the applicant allow a construction permit to expire and be canceled by the Commission, and then, after a conflicting FM rule making petition had been filed, file a second application in an effort to resurrect its previously abandoned proposal. Accordingly, the Cited Cases are not controlling precedent in the instant proceeding.

2. The Cited Cases Were Incorrectly Decided Because They Are Inconsistent with Section 73.208(a)(3)(iii) of the Rules.

Heftel respectfully asks the Commission to review the instant case bearing in mind that none of the Cited Cases refers to any Commission regulation or case authority for the proposition for which they are cited by the Joint Applicants. Furthermore, none of the Cited Cases

was reviewed by the Commission. It therefore appears that this is a case of first impression for the Commission. Finally, and most importantly, none of the Cited Cases refers to the Commission's decision in Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (1992), recon. granted in part and denied in part, 8 FCC Rcd 4743 (1993) ("Conflicts"), wherein the Commission directly addressed the time at which applications for new and modified FM facilities receive cut-off protection vis-a-vis petitions for rulemaking, and modified Section 73.208(a)(3) of its rules in accordance with its decision.

In Conflicts, the Commission concluded, as a general matter, that FM applications should receive protection from conflicting rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications. For applications other than those which are subject to a filing window or a specified cut-off date, the Commission stated as follows (page 4919):

All other FM applications -- including all minor change applications in either the reserved or nonreserved band and "first come, first served" applications for new FM stations or major changes in the nonreserved band filed after the close of a filing window (footnote omitted)-- will be protected from conflicting rulemaking proposals on the date they are received at the Commission.* (emphasis supplied)

* For purposes of this category, if a rulemaking petition is filed prior to or on the same date as a conflicting FM application, they will both be considered timely filed and treated under our existing substantive policy for resolving conflicts between applications and rulemaking petitions.

Based on the outcome of the Conflicts proceeding, the relevant portions of Section 73.208(a)(3) were revised to read as follows:

(3) Petitions to amend the Table of Allotments that do not meet minimum distance separation requirements to transmitter sites specified in pending applications will not be considered unless they are filed no later than:

(i) The last day of a filing window if the application is for a new FM facility or a major change in the non-reserved band and is filed during a filing window established under section 73.3564(d)(3); or

(ii) The cut-off date established in a Commission Public Notice under §73.3564(d) and 73.3573(e) if the application is for a new FM facility or a major change in the reserved band; or

(iii) The date of receipt of all other types of FM applications.
(emphasis supplied)

Section 73.208(a)(3) is as clear as it can be. An application for a new station is entitled to cut-off protection only with respect to petitions filed after the close of the relevant filing window, and is subject to comparative consideration with petitions filed prior thereto.^{18/} To the extent that the Cited Cases reached a different conclusion, they were incorrectly decided.

More to the point in the present context, applications for a minor change in a station's facilities (which are not subject to a filing window) receive cut-off protection from petitions for rulemaking filed after, but not those filed before, the application is filed with the Commission. See Conflicts and Section 73.208(a)(3)(iii) (quoted above). None of the Cited Cases involved minor change applications, and they are therefore also distinguishable in that respect from

^{18/} The Commission made note of the opportunity for parties to file FM rule making petitions in conflict with FM applications in its consideration of the assertion that the new rules violated Section 307(b) because they changed the prior system which favored rule making petitions over conflicting applications. The Commission rejected this contention, and stated as follows (Conflicts (on reconsideration), 8 FCC Rcd 4743, at 4744):

What we have done, however, is to establish a deadline for filing rulemaking petitions so that FM applicants will not be exposed for a lengthy and unpredictable period of time to potentially conflicting rulemaking proposals.....While this rule limits the filing of petitions, it does not violate Section 307(b) of the Act because it does not eliminate a party's ability to file a rulemaking proposal which may serve a higher allotment priority under Section 307(b) of the Act than a conflicting FM application.(emphasis supplied)

In other words, the Commission concluded that although the new version of Section 73.208(a)(3) limited the time period for filing FM rule making petitions which conflicted with FM applications, the rule did not violate the Section 307(b) rights of potential petitioners because an FM rulemaking petition could be filed in accordance with the cut-off limitations established in the new rule, and that a timely-filed petition would be considered on its merits vis-a-vis a conflicting FM application.

the present situation. In any event, to the extent that the conclusions reached in the Cited Cases may be thought to be applicable to minor change applications, they were incorrectly decided. Heftel's Petition was filed with (and retained by) the Commission four months before Snyder filed its minor change Channel 240C1 upgrade application, and therefore Snyder's application is not entitled to cut off protection vis-a-vis Heftel's Petition; conversely, because Heftel's Petition was submitted prior to the filing of Snyder's application, under Conflicts and Section 73.208(a)(3)(iii), the public interest benefits of Heftel's proposal must be compared with the public interest benefits of Snyder's application (and with those of any other timely and properly filed counterproposal).

3. The Cited Cases Were Incorrectly Decided Because They Are Inconsistent with Section 307(b) of the Communications Act.^{19/}

Standing astride this proceeding like The Colossus at Rhodes is Section 307(b) of the Communications Act (47 U.S.C.A. Section 307(b)) (hereafter "Section 307(b)"). Section 307(b) commands the Commission to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." It is axiomatic that no Commission rule, policy, or decision which conflicts with Section 307(b), as interpreted by appellate authority, is valid. Heftel submits that Section 307(b), as interpreted by appellate authority, requires that the Commission to compare the public interest benefits of its proposal with the public interest benefits of all other properly-filed and conflicting counterproposals which were on file with the Commission as of the May 5, 1997 comment/counterproposal date announced in the NPRM. Heftel finds it both remarkable and

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Should the Commission concur with Heftel's position that the Cited Cases are factually distinguishable from the instant case (see Section II.C.1, above) or that the Cited Case were incorrectly decided under Section 73.208(a)(3) of the rules (see Section II.C.2, above), and that Heftel's Petition is entitled to comparative consideration with Snyder's upgrade application under Section 73.208(a)(3)(iii) of the rules, there would be no need for the Commission to address the statutory Section 307(b) issue raised in Section II.C.3 of this pleading.

significant that none of the Cited Cases includes any discussion of Section 307(b). Heftel contends that the Cited Cases were incorrectly decided as a matter of law if, for no other reason, than because they are plainly inconsistent with the statutory mandate of Section 307(b).

In this remarkable proceeding, the Joint Applicants have not disputed that Heftel's proposal will bring net service gains to more than 3 million people and a first local service to the community of Lewisville (population 46,521) . The Joint Applicants, for obvious reasons, do not even mention the service gains which their proposals would effectuate because the total of these gains (even assuming that Metro's proposal is considered) is only 495,748, an insignificant figure in comparison to the gains from Heftel's proposal. Accordingly, Section 307(b), which is not mentioned a single time by the Joint Applicants, deserves the Commission's most serious consideration.

As the Supreme Court held in the seminal case of FCC v. Allentown Broadcasting, 349 U.S. 358, 361 (1955), "when mutually exclusive applications seek authority to serve different communities, the Commission first determines which community has the greater need for additional services." Consequently, the Commission would not comply with its statutory mandate and the cases interpreting that mandate if it declined to compare the relative merits of the Heftel Petition against all other valid conflicting counterproposals. The Court of Appeals has stated that satisfaction of the statutory commands contained in Section 307(b) is not a one-time thing, because the balance of demand for service will shift among communities over time. Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046, n.39 (D.C. Cir. 1997). Any Commission policy which holds otherwise (i.e. protecting an FM application for an unused allotment from comparison with a previously filed conflicting FM rulemaking petition) is contrary to the command of Section 307(b).

Heftel does not disagree with the basic premise of the Cited Cases--namely, that the Commission may adopt administrative regulations such as filing deadlines to allow for the orderly processing of rule making petitions or applications. See, Ashbacker v. FCC, 326 U.S. 327, 333 at n.9 (1945). Should the Commission adopt such regulations, however, it must give clear notice to prospective applicants as to what is being cut-off. See Ridge Radio Corp. v. FCC, 292 F.2d 770, 773 (D.C. Cir 1961) ("Ridge Radio"). In that case the Court held that the Commission may not give public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut-off by the notice. Ridge Radio at 773. Similarly, the Commission must give appropriate notice of a policy whereby a petition for rulemaking is dismissed if an applicant files--or, as in this case, refiles after cancellation--for an allotment which the petition seeks to modify or delete. Reeder v. FCC, 865 F.2d 1298, 1304 (D.C. Cir. 1989) ("Reeder"). There is no authority, rule, or rulemaking for the policy relied on by the Joint Applicants in the Cited Cases.

The policy contained in the Cited Cases (if correctly summarized by the Joint Applicants) is a fait accompli, because no notice was given, nor was there an adequate opportunity for comment on the policy apparently advanced by the Allocations Branch in the Cited Cases. To the extent the Cited Cases represent current Commission policy, it cannot withstand the notice and comment requirements of Section 553(b) Administrative Procedure Act. Reeder at 1304. Moreover, even if the Commission had given notice or has a policy which might cut off Heftel's Petition from consideration on the merits, that notice or policy could not stand given the requirements of Ridge Radio and Reeder for clear and unambiguous notice, as well as the opportunity for comment.